



Michigan Association of Planning
A Chapter of the American Planning Association

June 28, 2011

Senate Committee on Natural Resources, Environment, and Great Lakes

Testimony on HB 4746 / SB 470

In response to the following statements offered for this proposed amendment to the Michigan Zoning Enable Act, please consider:

1. *The Michigan Supreme Court was troubled by and asked the Michigan Legislature to respond to its decision in Kyser v. Kasson Township: Nothing in the Supreme Court's decision indicates that it was in any way troubled by its conclusion that *Silva v. Ada Township* had been wrongly decided and that it should be overturned, and nothing in that decision suggests that the Court was looking to the Legislature to somehow do through legislation what it could not do through judicial decree. Rather, after careful and well-reasoned analysis, the Court concluded that there was no precedential basis behind the *Silva* 'no very serious consequences' rule, that that rule was constitutionally and statutorily unsound, and that it should no longer be applied.*
2. *The Kyser decision has created an 'imbalance' in Michigan's laws regarding zoning and land use that should be corrected by adopting legislatively the *Silva* 'no very serious consequences' rule: To the contrary, the Kyser decision undid a distortion in Michigan's land use and zoning laws that was created by *Silva* itself. Ever since the U.S. Supreme Court's seminal decision in *Euclid v. Ambler Realty* in 1926, that Court and the Michigan courts have consistently recognized zoning as a valid exercise of the police power to protect public health, safety, morals, and the general welfare. The courts have also consistently held that a local government's zoning decision—either to allow a land use or prohibit one—should be upheld, except when a plaintiff proves that the decision was wholly irrational, arbitrary, and capricious. The *Silva* rule flipped this doctrine entirely on its head by creating the presumption that a zoning decision limiting mineral extraction is unlawful and should be struck down, unless the government proves that it is absolutely necessary to protect public health, safety and welfare. No other land use receives such special protection, and the Michigan Supreme Court concluded that there was no reason that mineral extraction should be treated any differently. The Kyser decision did not create imbalance; it returned Michigan zoning law to an even keel by overturning the imbalance that had been created by *Silva*.*

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3. *Mineral extraction deserves special treatment because minerals can be extracted only where they are found:* While this concern is logical at first blush, the great wealth of natural resources that Michigan enjoys – including mineral resources – makes it unwarranted. Roughly half of Kasson Township, for example, is underlain by commercially valuable sand and gravel. It's hard to imagine another potential commercial or industrial land use that could be accommodated so readily. Moreover, every property has attributes that make it more or less suitable for a given land use. The Michigan Supreme Court itself concluded that there was nothing obviously different between being prevented from extracting resources and being prevented from using land in any other way. The Court noted that a wide array of land uses that are viewed as reasonable, including those especially well-suited for a particular property, can be excluded by a zoning ordinance, provided the ordinance is reasonable. When compared to any other potentially valuable attribute of a property, having minerals does not render a given piece of land any more unique or valuable in a way that warrants placing resource extraction above any other potential use – especially in a resource-rich state like Michigan. It certainly does not warrant providing the exceptional level of preference afforded by the *Silva* 'no very serious consequences' rule.
4. *Adding the Silva 'no very serious consequences rule' to the MZEA will protect property rights by preventing unwarranted regulation of a valuable land use:* The *Silva* 'no very serious consequences rule' is not a property rights protection rule. Rather, it is a preferred land use doctrine, one that elevates resource extraction above all other valuable uses of land. As just noted, the Michigan Supreme Court saw no reason to provide mineral and other resource extractive land uses in the State of Michigan such elevated protection, and the Michigan Legislature should not do so either. Indeed, as made clear by the many neighbors of mining operations who raise real public health, safety, and welfare concerns, not to mention property value concerns, providing such extra-ordinary protection for mining operations through state legislation could well come at a tremendous cost to virtually everyone in Michigan's communities except for the owners of the mined properties.
5. *Adding the Silva 'no very serious consequences rule' to the MZEA will create jobs by preventing NIMBY neighbors from prohibiting needed mineral extraction operations:* Based on readily available census data, the number of commercial sand and gravel mining jobs has declined substantially in both the U.S. and Michigan during the past 10 years. This appears to be based on a decline in demand for sand and gravel, however, not a lack of available mining operations. There is nothing to suggest that allowing more extensive sand and gravel operations will in any way increase extraction jobs; at best it will simply move jobs from one place to another. At worst, the only job-inducing effects this proposed amendment will have will be to provide new jobs for lawyers caught up in the unnecessary and unproductive litigation that this proposed amendment will surely yield. This is a lawyer employment bill; nothing more.

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